(3)

No. 90-191

Supreme Court, U.S.
FILED
OCT 2
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID M. BUCKLEY and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

On Petition For Writ Of Certiorari To
The Colorado Court Of Appeals

REPLY BRIEF OF PETITIONERS

CHARLES F. MARINO
Counsel of Record
39 South LaSalle Street
Chicago, Illinois 60603
(312) 236-4260

JAMES J. MORRATO
STEPHEN B. SHAPIRO
MORRATO, BIEGING, BURRUS
& COLANTUNO, P.C.
5350 South DTC Parkway
Building 52
Engelwood, Colorado 80111
(303) 741-2100

Attorneys for Petitioners

Photex — 444 North Wabash Avenue — Chicago 60611 — 321-0228

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
I.	The Petitioners have not misstated the evidence, as claimed by the Respondent, regarding what Buckley had been told by another Fashion Bar employee, namely, that Ellis had taken money from the cash register and placed it in an envelope containing her personal cancelled checks.....	1
II.	This Court does not lack jurisdiction, as claimed by the Respondent.....	4
III.	The Petitioners have not misstated the facts, evidence, and law, as claimed by the Respondent, with respect to how this case relates to Pacific Mutual Life Insurance Company v. Haslip (No. 89-1279), which is scheduled for argument before this Court on October 3, 1990.....	8
IV.	Contrary to the Respondent's assertions, the standards for the imposition of punitive damages in Colorado are not consistent with due process.....	9

Page

V. Damages for outrageous conduct are not compensatory, as contended by Respondent, and when awarded in addition to punitive damages, result in double punishment and violate due process..... 12

VI. The issues presented by the Petition for a Writ of Certiorari are not moot..... 14

TABLE OF AUTHORITIES

Page

Cases

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. 492 U.S. ____, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).. 6

Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. App. 1985)..... 12

Pacific Mutual Life Insurance Company v. Cleopatra Haslip, 553 So.2d 537 (1989), cert. granted April 2, 1990, (No. 89-1279)..... 9

Palmer v. A. H. Robbins Co., 684 P.2d 187 (Colo. 1984)... 12

Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 483, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)..... 7

Vogel v. Carolina International, Inc., 711 P.2d 708 (Colo. App. 1985)..... 13

United States Statutes

28 U.S.C. Sec. 1257(a) 4
29 U.S.C. Sec. 2001, et seq..... 14, 15, 16

Page

Colorado Statutes

Colo. Rev. Stat.
Sec. 13-21-102 (amended). 16, 17

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DAVID M. BUCKLEY
and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,
Petitioners,
vs.
TAMMIE R. ELLIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

REPLY BRIEF ON PETITION FOR CERTIORARI TO THE COLORADO COURT OF APPEALS

The Respondent has given six reasons why this Court should not grant certiorari in this case. None of them is persuasive. The Petitioners' response is as follows:

I

The Petitioners have not misstated the evidence, as claimed by the Respondent, regarding what Buckley had been told by another Fashion Bar employee, namely, that Ellis had taken money from the cash register and placed it in an envelope containing her personal cancelled checks.

As stated on pages 9 and 10 of the Petition for Writ of Certiorari, the court "whited out" Ellis' name on the copy of Buckley's report to Fashion Bar which went to the jury, so that the jury would not know that Ellis was the person accused. This was done in response to a hearsay objection made by the Respondent's attorney. However, so it would be available

on appeal, the trial court placed a copy of the report, without deletions, in a sealed envelope as Exhibit F and made it a part of the record (Tr. Vol. 4 p. 592 and Vol. X, Ex. F).

The pertinent portion of Exhibit F reads as follows:

> Prior to this subject's polygraph examination, she stated that she saw Tammie Ellis take some money from the cash register at Fashion Bar and place it in an envelope containing her personal cancelled checks. The subject also stated that she then saw Ms. Ellis place the envelope under her desk. The subject stated that she thought Ms. Ellis was probably stealing the money because it is not normal procedure for cashiers to remove money from the register in that fashion.

The Petitioners did not offer the report to prove the truth of the accusation made by the other Fashion Bar employee. The issue was not whether the accusation was true or false, but whether, having been made, it gave Buckley reason along with the polygraph test

results to question the Plaintiff as he did during the post-test interview. The accusation bears upon Buckley's state of mind when questioning the Plaintiff and, on that basis, should be considered as an exception to the hearsay rule.

The Respondent claims that the other Fashion Bar employee was available and that the Respondent was ready to call her as a rebuttal witness, if necessary, and the Respondent was prepared to show that her supervisor had approved of her cashing a personal check. If this is true, it is being disclosed for the first time now. It was not revealed at the time of trial and the Respondent cites no reference thereto in the Record. The Petitioners could not locate the other Fashion Bar employee who made the accusation. Otherwise, they would

have called her as a witness at the trial and avoided the hearsay objection.

Also, the Respondent claims that there was evidence that the thefts in question were committed by others who had ultimately made restitution. The Respondent cites no reference thereto in the Record and, insofar as Petitioners are aware, it is an incorrect statement.

II

This Court does not lack jurisdiction, as claimed by the Respondent. The Petition contains a typographical error in stating that jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a). It should have read 28 U.S.C. Section 1257(a) and Petitioners request that it be corrected accordingly. Section 1257(a) provides that:

> Final judgments or decreees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by

> writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Respondent contends that jurisdiction of this Court depends on whether a federal constitutional question was set up or claimed in the state court, and that the "due process" issue was not raised by Petitioners until they filed their Petition for Reconsideration on Denial of the Petition for Certiorari in the Colorado Supreme Court.

However, 28 U.S.C. Section 1257(a) does not expressly require that the federal constitutional question be set up or claimed in the proceedings below and Petitioners submit that this Court

has jurisdiction if the federal constitutional question is set up or claimed in the Petition for Writ of Certiorari timely filed in this Court.

In Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), this Court declined to consider a due process challenge to punitive damages which was not set up or claimed in the Petition for Writ of Certiorari filed in this Court, but was raised for the first time in the briefs filed in this Court after certiorari had been granted on a different question, namely, whether punitive damages violated the Excessive Fines Clause in the Eighth Amendment. Such is not the case here. The Petitioners set up and claimed the due process challenge to punitive damages not only in their Petition for Writ

of Certiorari filed in this Court, but also in their Petition for Reconsideration on Denial of the Petition for Certiorari to the Colorado Supreme Court. Moreover, the events in this case closely parallel those in Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 483, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), where this Court granted certiorari and reversed a decision of the Oklahoma Court of Appeals on the constitutionality of the non-claim clause in the Oklahoma Probate Code. There, the due process challenge was not raised until the petitioner sought rehearing in the Oklahoma Court of Appeals as shown by the following passage in this Court's opinion:

> The District Court's reading of §594's relationship to the nonclaim statute was affirmed by the Oklahoma Court of Appeals. Id., at 7. Appellant then sought rehearing, arguing for the first time that the nonclaim statute's notice provisions violated due process. In a supplemental opinion on rehearing the Court of Appeals

> rejected the due process claim on the merits. Id., at 15.

Further, the Petitioner challenged punitive damages in this case for excessiveness and duplication of the damages awarded for outrageous conduct in both the trial court and Colorado Court of Appeals. See, Trial Court's Rulings Regarding Defendant's Motions for Post Trial Relief -- Rule 59 C.R.C.P. (Appendix A 7-9) and dissenting opinion in Colorado Court of Appeals Decision (Appendix B 13-17). It should not be necessary to use the words "due process" where, in fact, the challenge was based upon a lack of fundamental fairness which is implicit in every due process claim.

Petitioners submit that this Court has jurisdiction to grant certiorari in this case.

III

The Petitioners have not misstated the facts, evidence and law, as claimed

by the Respondent, with respect to how this case relates to Pacific Mutual Life Insurance Company v. Haslip (No. 89-1279), which is scheduled for argument before this Court on October 3, 1990. In their Petition for Writ of Certiorari, the Petitioners stated on pages 21, 45 and 46 that this Court has before it Pacific Mutual, wherein it will shortly decide whether the procedures used in civil punitive damage cases violate due process; that certain of the issues in Pacific Mutual are also found in this case; and that Pacific Mutual does not involve a claim for outrageous conduct and does not contain a question regarding double punishment by awarding punitive damages in outrageous conduct cases. Those statements are entirely correct.

IV

Contrary to the Respondent's assertions, the standards for the imposition

of punitive damages in Colorado are not consistent with due process. As pointed out on page 25 of the Petition for Writ of Certiorari, the Colorado punitive damage statute, as it existed at the time this action arose, violated due process because it allowed juries to award punitive damages in any amount they deemed reasonable for conduct which was no more offensive than insulting. The decision as to whether or not to award punitive damages and the amount thereof was left to the moral discretion of the jury. Also, as was noted on pages 26 to 28 of the Petition for Writ of Certiorari, the Colorado legislature later amended the Colorado punitive damage statute to adopt certain standards to guide jurors and courts. However, the amended punitive damage statute is still deficient, because it fails

to guide the jurors as to the circumstances in which fraud, malice or willful and wanton conduct should be punished and fix a definite upper limit therefor, such as a maximum fine in a criminal case. Also, it fails to provide for a bifurcated trial. In this case, both the trial court and Colorado Court of Appeals used subjective value judgments as standards in reviewing the $125,000 punitive damage award. The standard applied by the trial court was whether the outrageous damage award and punitive damage award was (a) grossly and manifestly unjust or excessive, or (b) the result of bias, prejudice or passion. The standard applied by the majority on the Colorado Court of Appeals was whether the punitive damage award was completely unsupported by the record. Neither of these was a meaningful standard which comported with due process.

In Palmer v. A. H. Robbins Co., 684 P.2d 187 (Colo. 1984), the Colorado Supreme Court upheld a punitive damage award of $6,200,000, and in Coale v. Dow Chemical co., 701 P.2d 885 (Colo. App. 1985), the Colorado Court of Appeals affirmed $800,000 in punitive damages against one defendant and $200,000 in punitive damages against another defendant. Colorado courts have consistently displayed great reluctance to reverse or reduce large punitive damage awards and have no meaningful standards for reviewing such awards.

V

Damages for outrageous conduct are to punish the wrongdoer and set an example. They are not compensatory, as contended by the Respondent, and when awarded in addition to punitive damages, result in double punishment and violate due process.

The Respondent suffered an extremely nominal injury, i.e., a few minutes of tears and an evening of being upset, and only took an aspirin or two for headaches. For this, the jury awarded her $48,000 in damages for outrageous conduct. No reasonable person could say that $48,000 was compensatory. In reality, it was punishment for what the jury perceived to be wrongdoing on the part of the Petitioners. But that was not enough punishment. The jury then doubled up the punishment by awarding the Respondent an additional $125,000 for punitive damages.

The Colorado courts have recognized that damages for outrageous conduct and punitive damages are both intended for punishment. In Vogel v. Carolina International, Inc., 711 P.2d 708 (Colo. App. 1985), the Court stated:

> We do not dispute the fact that both exemplary damages and damages for outrageous conduct are directed toward deterrence and punishment of wrongful conduct. See Palmer v. A. H. Robbins Co., supra; Danyew v. Phelps, 676 P.2d 707 (Colo. App. 1983).

Juries in Colorado and elsewhere should not be permitted to continue the practice of punishing hapless defendants twice for the same offense. Such a practice is fundamentally unfair and lacking in due process.

VI

The issues presented by the Petition for a Writ of Certiorari are not moot.

The Respondent contends that the Federal Government has preempted the area of civil law addressed to this action by passing the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, et seq. This is not true. The Act expressly provides that it does not preempt any state or local law which

is more restrictive (Section 2009). In addition, the Act specifically allows private sector employers, such as Fashion Bar, to use polygraph tests in ongoing investigations of economic loss, such as theft, embezzlement and misappropriation, where the employee had access to the property that is the subject of the investigation and the employer has reasonable suspicion that the employee was involved. Here, there was $1,800 in cash shortages and another employee reported seeing the Respondent remove money from the cash register and place it in an envelope containing her personal cancelled checks. Accordingly, this would have been an appropriate case in which to give a polygraph test under the Act. Further, the Act specifically requires the employer to interview the employee following the polygraph test

(Section 2007(b)(4)(A)). Here, the outrageous conduct leading to punitive damages occurred, if at all, during the post-test interview. There is nothing in the Act which would prevent a jury from awarding both damages for outrageous conduct and punitive damages as was done here. The Employee Polygraph Protection Act of 1988 does not moot the issues presented in this case. It does not even address those issues.

The Respondent also asserts that the 1986 amendment to the Colorado punitive damages statute provides an even more detailed statute regarding punitive damages. This is true. However, it does not render the issues presented by the Petition for a Writ of Certiorari moot. Firstly, the 1986 amendment is not retroactive and controls only cases arising after its effective date. It

does not apply to this case or any other cases arising prior to the Act. Secondly, as pointed out on pages 27 to 29 of the Petition for a Writ of Certiorari, the amended punitive damage statute is still deficient because it fails to guide jurors as to the circumstances in which fraud, malice or willful and wanton conduct should be punished and fix a definite upper limit therefor, such as a maximum fine in a criminal case. Also, it fails to provide for a bifurcated trial.

If anything, the 1986 amendment illustrates the glaring deficiencies in the punitive damages statute as it existed at the time this action arose. It certainly does not render the issues moot in this case.

CONCLUSION

The Petitioners respectfully request that a Writ of Certiorari be granted in this case.

October 1, 1990

Respectfully submitted,

CHARLES F. MARINO
Counsel of Record
39 South LaSalle Street
Chicago, Illinois 60603
(312) 236-4260

JAMES J. MORRATO and
STEPHEN B. SHAPIRO
MORRATO, BIEGING,
BURRUS & COLANTUNO, P.C.
5350 So. DTC Parkway
Building 52
Englewood, Colorado 80011
(303) 741-2100

Attorneys for Petitioners
David M. Buckley and
John E. Reid and Associates, Inc.